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RESEARCH REPORT

JUDICIAL ATTITUDES TO CONDITIONAL TERMS OF IMPRISONMENT: RESULTS OF A NATIONAL SURVEY

2000-10e

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Centre of Criminology at the University of Ottawa

with the assistance of
Carol La Prairie, Judge David Cole, and Tracy Perry

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1.0 INTRODUCTION

1.1 Purpose of Survey

There are two ways of understanding judicial reaction to the new sanction. One is through an analysis of case law, and the other is through a systematic survey of trial court judges. The weakness with the case law approach is three-fold. First, only a very small percentage of sentences imposed will be captured by the reporting services. By the time that this survey of judges was completed, approximately 20,000 conditional sentences had been imposed across the country. Second, those that are reported may well be (presumably should be) noteworthy in some respect, and therefore not representative of the majority of conditional sentences imposed.

The remaining weakness with an analysis of reported decisions is that the underlying judicial reasoning has, to a large extent, to be inferred, as the judgement is not usually comprehensive enough to explain all the reasons giving rise to the sanction. Trial judges rarely have the time to write judgements that explain all the relevant factors considered at the time of sentencing. A survey on the other hand, has the advantage of containing direct questions relating to the use of the conditional sentence. This report then, should be read with a view to supplementing any legal analysis based upon reported decisions.

One last issue is worth addressing. Judicial reasoning with respect to section 742 is not static; it is evolving continually, in response to judgements from the provincial Courts of Appeal, emerging socio-legal scholarship, experience with the sanction itself, and, perhaps, public opinion. Judges' use of conditional sentences of imprisonment will also likely be affected by offenders' behaviour: if the breach rate of orders remains low, and public reaction is not overwhelmingly negative, then we are likely to see continued growth in the use of the sanction. Lastly, this chapter was written in the Spring of 1999, when the Supreme Court of Canada is being asked to review six appeals involving conditional sentences (see Campbell, 1999). The Court's reaction to those cases will likely have an important impact on the use of conditional terms of imprisonment at the trial court level. This survey presents a view of judicial reaction approximately 18 months into the conditional sentence regime.

The reaction of trial court judges to the new sanction is critical to understanding how the new sanction is being implemented. This is particularly true since provincial Courts of Appeal have adopted somewhat different positions with respect to the new disposition (Manson, 1998). The purpose of the survey was therefore to explore the experience of trial court judges with conditional sentencing since September 1996.

1.2 Methodology

A questionnaire was developed and pre-tested with a sample of 13 judges in Toronto and Ottawa. The survey included questions exploring the respondent's experience with conditional sentencing, as well as many other issues relating to the administration of the

new sanction. Once the questionnaire was ready, it was distributed across the country to all adult criminal trial judges, through their respective Chief Judges and Chief Justices. Respondents were provided with a response envelope, and the questionnaires were returned directly to the Department of Justice Canada. Responses were anonymous, although some judges included letters with additional commentary on the issues raised.

Distribution began in May 1998 and was completed by September 1998. Response rates are critical to any survey. Attempts were made to ensure the largest number of responses. By the time that the data-collection phase had been completed, responses had been obtained from 461 judges, which represent 36% of the total population. This is a respectable response rate for a busy professional sample, and compares favourably with other criminal justice surveys. The last systematic survey of sentencing judges across Canada was conducted in 1986, and generated a response rate of 32% (see Research Staff of the Canadian Sentencing Commission, 1988).

2.0 RESULTS

Table 2.1 provides a breakdown of the province or territory in which the respondent served. As can be seen, over half the responses came from three provinces, Ontario (30% of total); Quebec (16%) and Alberta (12%).

Table 2.1: Province/Territory of Respondent

Province/Territory	Number	% of Total
Ontario	134	30.1
Quebec	69	15.5
Alberta	51	11.5
British Columbia	50	11.2
Manitoba	33	7.4
Saskatchewan	25	5.6
New Brunswick	21	4.7
Nova Scotia	20	4.5
Newfoundland	16	3.6
Yukon	5	1.1
PEI	4	0.9
NWT	3	0.7
No response**	14	3.1
Total	445	100

** refers to no identification of jurisdiction on questionnaire

2.1 Use of Conditional Sentences to Date

Since the survey was conducted less than two years after the inception of the new sanction, it is perhaps not surprising that almost half the sample (45%) had imposed fewer than 10 conditional sentences. One-fifth (21%) had imposed between 11 and 20 conditional sentences, and one quarter had imposed more than 20. A small number of respondents (50 or 7%) had imposed more than 50 orders. Only 6% of the sample had not imposed a conditional sentence to date (Table 2.2).

Considerable regional variation in volume of orders

There was considerable variation across the country in the use of conditional sentences. In Alberta for example, only 30% of respondents had imposed 11 or more orders, while in neighbouring Saskatchewan, 61% of respondents reported having imposed 11 or more.

Comparisons between Ontario and Quebec make a similar point: in Quebec, almost three-quarters of respondents were "high users" of conditional sentences (11 or more) compared to only a third of Ontario judges. The complete breakdown of usage by province/ territory can be seen in Table 2.2.

Table 2.2: Number of Conditional Sentences Imposed by Province of Respondent

Province or territory:	Number of conditional sentences imposed: None	1-10	11-20	21 or more	Total
NF	6.3%	43.8%	12.5%	37.5%	100% (16)
PEI	--	*75.0%*	*25.0%*	--	*100% (4)*
NS	--	55.0%	30.0%	15.0%	100% (20)
NB	4.8%	23.8%	33.0%	38.1%	100% (21)
QC	8.5%	19.7%	25.4%	46.5%	100% (71)
ON	7.4%	55.1%	15.4%	22.1%	100% (136)
MN	15.6%	56.3%	15.6%	12.5%	100% (32)
SK	3.2%	35.5%	29.0%	32.3%	100% (31)
AB	5.7%	64.2%	18.9%	11.3%	100% (53)
BC	--	63.5%	21.2%	15.4%	100% (52)
YK	--	*20.0%*	*60.0%*	*20.0%*	*100% (5)*
NWT	--	*100.0%*	--	--	*100% (3)*
Total	6.1%	48.4%	20.9%	24.5%	100% (444)

Note: Percents in italics are based on a very small sample size. For this and all subsequent tables, the numbers of cases on which the percents are based are indicated in parentheses.

2.2 Objective of the Conditional Sentence of Imprisonment

Reducing the use of Imprisonment was seen as the most important objective of conditional sentences

In response to an open-ended question, over half the judges identified reducing imprisonment or providing a cost-effective alternative to prison as their understanding of the single most important objective of the new sanction. Promoting the rehabilitation of the offender was identified as the most important objective by a further quarter of the sample. It is interesting to note that slightly more than one judge in ten viewed conditional sentencing as an intermediate sanction.

Section 742 expressly identifies a conditional sentence as a replacement for a prison term, (and not a disposition to lie between probation and prison). However, these judges appear to have adopted a somewhat different interpretation of the provision, viewing a conditional sentence as both an alternative sanction and an intermediate sanction. (Table 2.3).

Table 2.3: Most Important Objective of Conditional Sentence

What do you consider to be the single most important objective of conditional sentences? (Q2)	
Response	Percent of judges giving this response
Reduce imprisonment	32.2%
Provide a more cost effective alternative than prison	24.2%
Provide another intermediate sanction	10.7%
Respond to the offender: rehabilitation, reintegration, employment, etc.	27.3%
Other	5.7%
Total	100% (422)

Note: We are reporting only the first objective mentioned; some judges mentioned more than one

2.3 Most appropriate offences for consideration of a conditional sentence

Property crimes seen as the offences for which a conditional sentence is most appropriate

Judges were asked whether they could identify any offences for which a conditional sentence was particularly appropriate. The results are summarized in Table 2.4. Of the total sample of 444 judges, 423 responded to this question, and of these, approximately two-thirds (64%) cited one or more property offences. One quarter chose the option that there are no offences for which the new disposition is particularly appropriate. Eight percent of respondents said that they would consider imposing a conditional sentence for a crime of violence; in these cases they had in mind only the less serious incidence. Section 742 does not identify any particular offence or offence category. However, responses to this question may suggest that judges interpret the question of risk to the community as one, which turns largely on the nature of the offence. Property offenders are generally perceived as being less of a threat to the safety of the community, which makes them particularly appropriate for a conditional sentence of imprisonment.

Table 2.4: Most Appropriate Offence for Conditional Sentence

Is there any kind of offence that you believe is particularly suited to a conditional sentence? (Q3a)	
Response	Percent of judges giving this response
There are no particular offences that are especially suited for a conditional sentence	26.2%
One or more violent offences (mostly "minor") was listed	7.6%
One or more property offences was listed	57.0%

Note: We have coded "violent" and "property" offences independently; hence a judge could have mentioned both.

2.4 Effectiveness of Conditional Sentence

Conditional sentence seen as effective as imprisonment in achieving rehabilitation...but not deterrence or denunciation

An important question emerging from the appellate case law to date is whether the conditional sentence can be as effective in achieving the goals of sentencing as the term of imprisonment that it replaces. Several provincial courts of appeal have asserted that

this can be the case in an appropriate fact situation. (e.g., *R.v.BiancoFiore*). Trial judges were asked whether a conditional sentence can be as effective as imprisonment in achieving: proportionality, denunciation, deterrence, rehabilitation and reparation. As table 2.5 indicates, respondents clearly felt that the conditional sentence is more effective in achieving some goals than others. Almost three-quarters (72%) of the sample believed that the conditional sentence was "always" or "usually" as effective as imprisonment in achieving rehabilitation. However only approximately one-third believed that this was true for deterrence, or denunciation. A quarter of the judges surveyed were of the opinion that a conditional term of imprisonment was never, or almost never as effective as conventional imprisonment in achieving deterrence (Table 2.5).

Table 2.5: Effectiveness of Conditional Sentence

	Can a conditional sentence be as effective as imprisonment in achieving…				
Judge responded it can be as effective…	Proportionality	Denunciation	Deterrence	Rehabilitation	Reparation
Always/ Usually	51.1%	35.3%	34.7%	71.7%	59.2%
Sometimes	33.6%	33.0%	40.9%	23.8%	30.7%
Almost Never/Never	15.3%	31.7%	24.4%	4.4%	10.1%
Total	100% (450)	100% (448)	100% (450)	100% (449)	100% (443)

Judges with more experience with conditional sentencing tend to have more positive views of the new sanction

We also explored the perceptions of judges as a function of their experience with conditional sentences. The sample was classified into three groups: those who had not imposed any conditional sentences to date, those who had imposed a few (operationally defined as between one and 10) and those who had imposed at least 11 such sentences. The first of these analyses reveal that judges who have imposed a significant number of conditional terms of imprisonment (11 or more) are more optimistic about the ability of the sanction to achieve proportionality, denunciation or deterrence.

For example, with respect to proportionality, almost two-thirds of the high-usage judges responded that conditions could be set which would make a conditional sentence as effective as a conventional prison term. In contrast, only 17% of the group who had never imposed a conditional sentence held this view. The low usage group fell in between these extremes. The same is true for the other sentencing objectives.[1]

2.5 Impact of a Conditional Sentence

[1] It is important to note that these are correlational analyses. We cannot establish whether experience with the sanction has changed judges' perceptions, or whether different perceptions of the new sanction lead judges to use the disposition more (or less) often.

One third of judges see a conditional sentence as having same impact as a probation order with the same conditions

Some light on responses to the effectiveness question is shed by responses to another. Respondents were asked whether they thought that a conditional sentence had a different impact on an offender than a probation order *with the same conditions*. In order to be effective, and to serve as a true replacement for imprisonment, a conditional sentence order should be truly distinct from a probation order. However, a third of the judges believed that a conditional sentence order did not have a different impact. Only one judge in five stated that a conditional sentence definitely had a different impact on the offender (see Table 2.6). This result may explain why some judges are skeptical about the ability of the conditional sentence to achieve some of the goals of sentencing: in terms of its "penal value" or impact on the offender, the conditional sentence is too similar to a term of probation. Not surprisingly, perhaps, judges who had imposed more conditional sentences were more likely to subscribe to the view that conditional sentences had a different impact on an offender.

Table 2.6: Relative Impact of Conditional Sentence

Do you think that a conditional sentence has a different impact on an offender than a probation order with the same conditions? (Q26)	
Response	Percent of judges giving this response
Definitely yes	21%
Probably yes	39%
Probably not	27%
Definitely not	7%
I don't know	7%
Total	100% (453)

2.6 Guidance from Courts of Appeal

Most judges wanted more guidance from their Courts of Appeal

Since the introduction of the new disposition in 1996, all provincial Courts of Appeal have rendered judgements about the appropriateness of conditional sentences. Courts of Appeal have made a significant number of judgements. And, as noted, five conditional sentence cases are now under appeal to the Supreme Court of Canada. Judges were asked whether they thought that they were receiving adequate guidance from their respective Courts of Appeal. Generally speaking, respondents seemed to feel that more guidance was required: only 4% felt that adequate guidance was available for "all cases"; a further 32% felt that guidance was available in most cases. The percentage of judges stating that they never received adequate guidance was three times higher than the percentage that responded that they always received adequate guidance (see Table 2.7).

Table 2.7: Adequacy of Guidance from Courts of Appeal, all respondents

Do you believe you receive adequate advice from the Courts of Appeal on the use of conditional sentences? (Q8)	
Response	Percent of judges giving this response
Yes, in all cases	4.4%
Yes, in most cases	31.6%
Yes, in some cases	26.3%
Yes, in few cases	26.5%
No, never	11.3%
Total	100% (434)

Responses with respect to the Courts of Appeal would appear to be most positive in Newfoundland (where 50% stated that they received adequate guidance in all or most cases), and least positive in Ontario, where only approximately one-quarter of judges held this view (see Table 2.8).

Table 2.8: Adequacy of Guidance from Courts of Appeal by Province of Respondent

	Received adequate guidance: (Q8)			
Province or territory:	All or most cases	Some cases	Few or no cases	Total
NF	50.0%	25.0%	25.0%	100% (16)
PEI	*25.0%*	*25.0%*	*50.0%*	*100% (4)*
NS	47.1%	11.8%	41.2%	100% (17)
NB	38.1%	33.3%	28.6%	100% (21)
QC	44.8%	25.4%	29.9%	100% (67)
ON	26.6%	25.8%	47.7%	100% (128)
MN	43.8%	34.4%	21.9%	100% (32)
SK	33.3%	33.3%	33.3%	100% (30)
AB	44.0%	14.0%	42.0%	100% (50)
BC	30.6%	30.6%	38.8%	100% (49)
YK	*25.0%*	*50.0%*	*25.0%*	*100% (4)*
NWT	*66.7%*	*33.3%*	--	*100% (3)*

Note: Percents in italics are based on a very small sample size.

Two qualifications should be borne in mind when considering these trends. First, we have no comparative data. That is, we cannot explore judges' perceptions about the extent of guidance that they receive from Courts of Appeal with respect to other sentencing or trial issues. As well, this survey was conducted in mid-1998. Since then, additional appellate judgements have been handed down, and trial court judges' perceptions of the extent of appellate guidance may have changed. Finally, by the time that this report is published, the Supreme Court may well have provided important guidance with respect to section 742, as a result of the six pending appeals.

2.7 Community/Supervisory Resource Issues

Community resources, particularly adequate supervisory resources, are an important issue for judges considering the imposition of a conditional sentence. Several questions on the survey addressed this issue. Judges seemed somewhat divided on whether they were able

to find out what community resources were available: 43% responded that they were able to find out about resources all or most of the time, while 31% stated that they rarely or never were able to find out about such resources (Table 2.9).

Table 2.9: Availability of Resources

If you are considering a conditional sentence, are you able to find out what community resources are available and which might be appropriate for the case before you? (Q9)	
Response	Percent of judges giving this response
Yes, all the time	9.3%
Yes, most of the time	34.1%
Yes, some of the time	25.9%
Rarely	28.4%
No, never	2.2%
Total	100% (451)

Judges would impose more conditional sentences if there were more support resources

The importance of the issue of community and supervisory resources can be seen by the next Table 2.10, which shows that fully four out of five judges state that they would be more inclined to impose conditional terms of imprisonment if they could be assured that more resources were available. Judges with experience imposing conditional sentences were marginally more likely to state that they would impose conditional sentence orders more frequently if there were more community resources available (see Table 2.10).

Table 2.10: Attitudes toward Conditional Sentences as a Function of Community Resources

Would you be inclined to use conditional sentences more frequently if there were more community and supervisory resources? (Q11)	
Response	Percent of judges giving this response
Yes	80.2%
No	19.8%
Total	100% (439)

A similar divergence of opinion emerged with respect to the question of supervision. A rather low percentage of respondents (approximately one-quarter) felt that conditional sentence orders are being adequately supervised "all" or "most of the time" A higher percentage (27%) believed that adequate supervision was provided "rarely" or "never". It is worth noting that a third of the respondents chose "don't know" as a response option to this question (see Table 2.11). The following Table 2.11 presents the same data, but excluding the "don't know" respondents.

Table 2.11: Adequacy of Supervision

Do you believe that conditional sentence orders are being adequately supervised in your area? (Q10: Total sample)	
Response	Percent of judges giving this response
Yes, all the time	5.5%
Yes, most of the time	20.6%
Yes, some of the time	13.9%
Rarely	21.0%
No, never	6.4%
Don't know	32.5%
Total	100% (452)

As can be seen in Table 2.12, judges with more direct experience with conditional sentencing were more likely to hold the view that conditional sentences are adequately supervised in their areas. This suggests that confidence in the adequacy of supervision may play a role in whether a conditional sentence is imposed.[2]

Table 2.12: Adequacy of Supervision by Usage

	Do you believe that conditional sentence orders are being adequately supervised in your area? (Q10)			
Use of the conditional sentence	Yes, all or most of the time	Yes, sometimes	Rarely or never	Total
None	25.0%	16.7%	58.3%	100% (12)
Low (1-10)	34.1%	17.1%	48.8%	100% (129)
Medium or high (11 times or more)	43.6%	23.3%	33.1%	100% (163)

Note: Chi-square =9.04, df=4, Note: 3 cells with E<5, $p < .10$
Pooling "none" and "low", Chi-square = 8.56, df=2, $p<.05$

Judges were asked about the number of available treatment programs (such as substance abuse, anger management, mental health counselling, and drug therapy) in their respective jurisdictions. Almost 40% responded that the number of programs was "rarely" or "never" sufficient. One third stated that the number of programs was adequate for some cases, and a similar percentage felt that the number of programs was adequate for most or all cases (see Table 2.13). The high usage judges were more likely to believe that the number of treatment programs was adequate in their area (Table 2.14).

[2] This too is a correlational finding. However, in this case there is less ambiguity about the direction of causality. Handing down few conditional sentences is unlikely to change perceptions of the adequacy of supervision. The causal mechanism must be in the other direction: having a positive view of the adequacy of supervision enhances the possibility that the judge will impose a conditional sentence.

Table 2.13: Number of Available Treatment Programs

Is the number of available treatment and other programs in your area adequate to support the use of conditional sentences? (Q13)	
Response	Percent of judges giving this response
Yes, for all cases	2.9%
Yes, for most cases	27.1%
Yes, for some cases	32.0%
Rarely	31.0%
No, never	7.0%
Total	100% (413)

Table 2.14: Adequacy of Treatment Programs by Usage

	Is the number of available treatment and other programs in your area adequate to support the use of conditional sentences? (Q13)			
Use of the conditional sentence	Yes, for all or most cases	Yes, for some cases	Rarely or never	Total
None	23.5%	29.4%	47.1%	100% (17)
Low (1-10)	24.2%	30.4%	45.4%	100% (194)
Medium or high (11 times or more)	36.0%	33.5%	30.5%	100% (200)

Note: Chi-square =11.19, df=4, p=.025

A final question about support programs dealt with the need for additional treatment programs. Specifically, judges were asked to identify needs in light of what already existed in the area. Of the total sample, 281 responded to this question. The most frequently-identified need was for more counselling programs, cited by three-quarters of this group. After counselling, anger management (65%) and alcohol or drug treatment programs were identified as necessary additions.

2.8 Nature of Conditions Imposed

The number and nature of optional conditions imposed as part of a conditional sentence order are critical to the success of the new sanction. It is only through the careful, and creative tailoring of the optional conditions that the sanction can be distinguished from a probation order and made responsive to the needs of the particular offender. Empirical data on the use of different optional conditions are not yet available. For this reason, the responses to a question about the frequency of imposition of different conditions are particularly revealing.

Treatment and no-contact orders most frequently-imposed conditions

Table 2.15 shows the optional conditions most often imposed. Treatment and no contact orders are the most frequently-cited; 88% of the sample stated that they often imposed treatment, and 85% stated that they often imposed no contact orders. Curfews and order to abstain from alcohol or drugs were also frequently imposed by this sample of judges. House arrest with electronic monitoring was very rarely used: 78% said that they never

imposed this condition, 14% "rarely" and 8% "often". House arrest without electronic monitoring was somewhat more popular: 35% stated that they often imposed this condition, 28% "seldom" and 37% "never".

Table 2.15: Usage of Optional Conditions

	How often do you impose each of the following optional conditions? (Q12)			
Condition:	Often	Seldom	Never	Total
Alcohol/drug treatment	87.5%	11.8%	0.7%	100% (432)
Other treatment	68.5%	27.9%	3.6%	100% (391)
Restitution	61.7%	33.4%	4.8%	100% (413)
Community service work	77.3%	18.4%	4.3%	100% (418)
Curfew	70.5%	26.4%	3.1%	100% (420)
No contact	85.2%	13.3%	1.4%	100% (420)
House arrest with electronic monitoring	8.3%	13.9%	77.8%*	100% (374)
House arrest without electronic monitoring	34.8%	28.2%	37.0%	100% (376)
Abstain from alcohol	73.6%	21.9%	4.5%	100% (421)
Abstain from drugs	78.8%	18.6%	2.6%	100% (419)
Abstain from carrying a weapon	71.3%	23.0%	5.6%	100% (408)

*includes those who indicated that electronic monitoring is not available

2.9 Consequences of Violating Conditional Sentence Orders

A critical issue in the conditional sentence literature involves the consequences of breaching an order. Where a breach of conditions is formally alleged, the sentenced person may be immediately returned to custody; in some circumstances, service of the original conditional sentence order is suspended, and is only resumed when the prisoner is re-arrested. According to section 742, the court has several options in the event that a breach is proven: (a) the offender can be committed to custody to serve the balance of the term in prison; (b) the optional conditions may be altered, or (c) the court may choose to let the order continue without modification. The less likely the threat of imprisonment, the weaker the power of the conditional sentence orders. If offenders are seldom imprisoned following breach of conditions, the analogy of a "Sword of Damocles" is not very apt[3]. It is somewhat surprising that over 40% of the judges responded "don't know" when asked to estimate the proportion of cases in which the conditions of the conditional sentence order have been followed without violation. This may suggest that judges believed that a significant number of orders that had been imposed were still running at the time that the survey was conducted, or it may suggest the absence of much communication between the sentencing judge and the probation personnel who administer the orders. A similar percentage (41%) responded that conditions imposed had been followed without violation in all or most of the cases (see Table 2.16).

[3] *R. v. Brady*

Table 2.16: Experience with Violation of Conditions

Considering the conditional sentences that you have imposed, in what proportion of the cases have the conditions been followed without violation? (Q15)	
Response	Percent of judges giving this response
In all of the cases	9.0%
In most of the cases	32.2%
In some of the cases	10.0%
In few of the cases	6.5%
In none of the cases	1.2%
Don't know	41.2%
Total	100% (432)

Judges with experience with breach hearings report few problems[4]

If a breach of conditions is alleged, section 742 sets out a procedure by which the allegation can be heard in court. Judges were asked what proportion of offenders would have been brought back to court in the event that there "might have been a substantial violation of conditions". A large percentage (just under half, 49%) responded "don't know". Of those who did offer a response, most were inclined to the view that the offender alleged to violate his or her conditions had been brought back to court. Nevertheless, it is worthy of further research that half the judges were unaware of whether substantial allegations had been returned to court (see Table 2.17).

Table 2.17: Percentage of Cases Returned to Court

Of those cases where there might have been a substantial violation of terms of conditions, what proportion have been brought back to court? (Q16)	
Response	Percent of judges giving this response
All of the cases	14.4%
Most of the cases	14.6%
Some of the cases	6.5%
Few of the cases	8.6%
None of the cases	6.7%
I don't know	49.3%
Total	100% (418)

The high usage group were significantly more likely to report that violations had been brought back to court (42% vs. 18% of the low usage group). Taken together with the previous finding, these results suggest (not surprisingly perhaps) that a positive perception of, or experience with, the new disposition is associated with greater usage of the conditional sentence.

Judges report few problems with Breach hearings

In terms of breach hearings, few judges reported having experienced problems. Almost 40% had had no experience with breach hearings (Table 2.18). Table 2.19 presents these

[4] It is important to understand that the judge who imposed the original conditional sentence is not automatically notified when a breach of conditions is alleged (usually by a probation officer). Also, not every allegation of a breach condition results in formal proceedings being commenced; conditional sentence supervisors have a considerable measure of discretion.

data excluding those with no experience of those with some such experience, fewer than one in five reported "often" having experienced problems. One third responded that they occasionally experienced problems with breach hearings. As can be seen almost half the samples report that they had rarely experienced problems.

Table 2.18: Problems with Breach Hearings

If you've had experience with breach hearings, have you experienced any problems? (Q17)	
Response	Percent of judges giving this response
Often experienced problems	11.1%
Occasionally experienced problems	20.2%
Rarely experienced problems	30.4%
I have no experience with breach hearings	38.3%
Total	100% (431)

Table 2.19: Problems with Breach Hearings, excluding those with no experience

If you've had experience with breach hearings, have you experienced any problems? (Q17) **Excluding those who indicated that they have had no experience**	
Response	Percent of judges giving this response
Often experienced problems	18.0%
Occasionally experienced problems	32.7%
Rarely experienced problems	49.2%
Total	100% (266)

Most judges believe that incarceration is the appropriate response to a breach of conditions

Judges were asked whether they thought that an offender who breaches a conditional sentence order should be automatically sent to prison to serve the balance of the sentence. As Table 2.20 shows, the most frequent response option was "in most cases". A further 16% chose "in all cases". These trends suggest that judges believe the usual judicial reaction to breach should involve the incarceration of the offender. Nevertheless they strongly favour preserving sufficient judicial discretion to choose, in exceptional circumstances, some other route which does not invoke the incarceration of the offender for the balance of the original sentence.

Table 2.20: Judicial Response to Breach

Do you think an offender who breaches a conditional sentence should be automatically sent to prison to serve the balance of the sentence? (Q19)	
Response	Percent of judges giving this response
Yes, in all cases	16.3%
Yes, in most cases	45.3%
Yes, in some cases	22.4%
Yes, in a few cases	3.6%
No	14.1%
Total	100% (441)

An interesting pattern emerged between usage and responses to this question. As can be seen in Table 2.21, the only 12% of the high usage judges believed that an offender who

breaches should automatically be sent to prison to serve the balance of the sentence. In contrast, fully one-third of the group who had not imposed any conditional sentences held this view.

Table 2.21: Outcome of Breach by Usage

	Do you think an offender who breaches a conditional sentence should be automatically sent to prison to serve the balance of the sentence? (Q19)				
Use of the conditional sentence	Yes in all cases	Yes in most cases	Yes in some or few	No	Total
None	33.3%	58.3%	8.3%	--	100% (24)
Low (1-10)	19.0%	43.3%	23.8%	13.8%	100% (210)
Medium or high (11 times or more)	11.7%	42.0%	30.2%	16.1%	100% (205)

Note: Chi-square =17.84, df=6, p=.01 Note: Two E's<5, Minimum=3.39

2.10 Effects of Conditional Sentences of Imprisonment

The conditional sentence was introduced in 1996 as part of a general sentencing reform Bill (C-41). The specific goal of section 742 was to reduce, in a principled way, the number of provincial[5] admissions to custody across the country. It is probably too early in the new sentencing regime to come too definitive conclusions about the effect of section 742[6]. Nevertheless, judges were asked a series of questions about their perceptions of the effects of the conditional sentence. Three questions were asked about the effects of the new sanction.

Most judges believe that the conditional sentence has reduced the number of admissions to custody

Fully three-quarters of the sample were of the view that conditional sentences have reduced the number of admissions to custody in their respective courts. Twelve percent felt that there had been no reduction as a result of the introduction of the new sentence, and 12% had no opinion. It is clear then, that substantial numbers of sentencing judges believe that the new sanction has been successful in achieving its principal goal (see Table 2.22).

[5] As noted, the conditional sentence applies only to terms of custody under two years in length.

[6] Preliminary analyses suggest that the provincial incarceration rates have not declined since the introduction of the new sanction; see Reed and Roberts, 1999.

Table 2.22: Effectiveness of Conditional sentencing in reducing incarceration rates

In your opinion, have conditional sentences reduced the number of offenders sent to custody in your court? (Q20)	
Response	Percent of judges giving this response
Definitely yes	38.7%
Probably yes	36.4%
Probably not	10.2%
Definitely not	2.9%
I don't know	11.8%
Total	100% (450)

Considerable regional variation emerged with respect to this question. The percentage of judges who responded that conditional sentences had "definitely" reduced the number of offenders sent to custody ranged from a low of 3% in the NorthWest Territories to 50% in Ontario[7]. Over one-third of the respondents from the Prairie provinces held this view.

2.11 Public Perceptions of Conditional Sentences of Imprisonment

Conditional sentences carry a clear danger of generating public criticism of the sentencing process. Members of the public can be impatient with the complexities of the sentencing process, and tend to be critical of an absence of truth in sentencing. The conditional term of imprisonment has been described as a paradox (e.g., Gemmell, 1996; Roberts, 1997) the nature of which may be hard for the public to grasp. Polls in this country have long shown that most people believe that sentences are too lenient. Unless the conditions are properly crafted, a conditional term of imprisonment runs the risk of appearing to be a lenient disposition, comparable in severity or impact on the offender to a term of probation. The only studies relating to this issue are a survey of the Ontario public conducted in 1997 (see Marinos and Doob, 1998) and a national survey conducted in 1999 (Sanders, 1999). Nothing is known about judicial reaction to the views of the community with respect to conditional sentencing.

How do judges react to the issue of public perception and the conditional sentence? Several questions on the survey addressed this critical issue. Questions explored public knowledge of, and support for, conditional sentences, and judges were also asked whether they considered the impact on public opinion when sentencing an offender to a conditional sentence of imprisonment.

Judges feel that the public in general do not understand conditional sentences...

The first question asked respondents to state whether they thought that "the general public understands the nature of conditional sentences". As can be seen in Table 2.23, most judges (61%) thought that "only a few" members of the public understands conditional sentences. Only 3% of respondents chose the response that "most people" understood the nature of conditional sentences. Over three-quarters of the sample felt that few or no

[7] Fully 90% of the sample of Ontario judges responded that conditional sentences had "definitely" or "probably" reduced the number of admissions to custody.

members of the public understood the new disposition. As one respondent noted on the survey: "*the public have not been fully informed about the conditional sentencing process, and in that regard they look upon it with some scepticism*". Judges in Ontario were more likely to be pessimistic about the likelihood of public understanding (84% said that few or no members of the public understood conditional sentence, compared to 67% in Quebec), otherwise there were few regional differences.

Table 2.23: Public Understanding of Conditional Sentences

Do you think the general public understands the nature of conditional sentences? (Q23)	
Response	Percent of judges giving this response
Yes, most of the public	3.1%
Yes, some of the public	14.1%
Only a few of the public	61.0%
No, none of the public	17.0%
I don't know	4.8%
Total	100% (454)

....but that the informed public is quite supportive.

A slightly different question probed the issue of whether members of the public would support conditional sentences if they were more aware of their nature. Respondents were asked: "*Do you feel that members of the general public who are aware of the nature of conditional sentences support their use?*" Here, judicial perceptions of public opinion were more positive. Even though the vast majority of judges who participated in the survey said that the public does not understand conditional sentences, slightly over half (53%) thought that most or some of those people who understood conditional sentences supported their use (see Table 2.24). One judge noted that: "*I have spoken to people about the process and I have always been satisfied that when properly explained they [the public] fully understand and see the merits in it*".

Table 2.24: Reaction of "Informed" Public

Do you feel the members of the general public who are aware of the nature of conditional sentences support their use (Q24)	
Response	Percent of judges giving this response
Yes, all who are aware	1.1%
Yes, most who are aware	24.7%
Yes, some who are aware	28.7%
Only a few who are aware	24.3%
No, none who are aware	6.9%
I don't know	14.3%
Total	100% (449)

Judges divided on the question of whether the public can distinguish between conditional sentences and probation

It is clearly important for the sentencing system to distinguish conditional sentence orders from probation orders. There are obvious similarities between the two; both involve

supervision in the community, both involve mandatory and optional conditions, and there is considerable overlap between the conditions described in section 742, and 732. Nevertheless, Parliament intended the conditional sentence to be more severe than a term of probation. If the public perceive the conditional sentence of imprisonment to be no more severe than a term of probation, criticism of the sentencing process will likely grow. For this reason, we asked judges whether the general public can be made to understand the difference between a conditional sentence and a probation order.

The sample was fairly evenly split in their responses. Over one-third (35%) responded that "only a few" or "no" members of the public could be made to understand the difference. However, a similar percentage believed that "all or most" members of the public could be made to understand the difference (Table 2.25). Once again the Ontario judges tended to have a more pessimistic view than their colleagues in other parts of the country: judges in Ontario were less likely to express the view that the public could be made to comprehend the distinction between a conditional sentence and a term of probation.

Table 2.25: Potential Effectiveness of Public Education

Do you think that the general public can be made to understand the difference between a conditional sentence and a probation order? (Q25)	
Response	Percent of judges giving this response
Yes, all of the public	2.5%
Yes, most of the public	33.0%
Yes, some of the public	27.9%
Only a few of the public	30.1%
No, none of the public	6.5%
Total	100% (445)

"Frequent" users of conditional sentences more likely to have a positive view of public reaction

Some interesting, statistically significant relationships emerged between responses to the public opinion questions and usage patterns involving the new disposition. First, judges who might be classified as "high users" (those who reported having imposed more than 11 orders) were more likely to believe that members of the public were capable of distinguishing between probation orders and conditional sentence orders. Thus only 20% of judges who had never imposed a conditional sentence believed that all or most of the public could distinguish between the two sanctions, whereas over 40% of the higher usage judges held this view (see Table 2.26).

Table 2.26: Public Education by Usage

	Do you think the general public can be made to understand the difference between a conditional sentence and a probation order? (Q25)			
Use of the conditional sentence	Yes, all or most of the public	Yes, some	Few or none	Total
None	20.5%	28.0%	52.0%	100% (25)
Low (1-10)	31.2%	27.0%	41.9%	100% (215)
Medium or high (11 times or more)	41.9%	29.1%	29.1%	100% (203)

Note: Chi-square = 11.72, df=4, p=.02

In a similar fashion, as Table 2.27 shows, judges who were "high users" in terms of the new disposition were more likely to believe that the public *who were aware of conditional sentences* were supportive of the sanction. This suggests that judges will be more likely to use the conditional term of imprisonment if they believe that the public are likely to be supportive.

Table 2.27: 'Informed' Public Support by Usage

	Do you feel the members of the general public *who are aware* of the nature of conditional sentences support their use? (Q24)				
Use of the conditional sentence	Yes, all or most	Yes, some	Yes, a few, or none	don't know	Total
None	15.4%	26.9%	38.5%	19.2%	100% (26)
Low (1-10)	19.7%	26.1%	37.6%	16.5%	100% (218)
Medium or high (11 times or more)	34.0%	31.5%	23.6%	10.8%	100% (203)

Note: Chi-square =20.44, df=6, p<.01 Note: One E=3.66

Clearly then, judges believe that the public need to be educated about the nature and function of conditional sentences. A policy recommendation emerging from this survey would therefore involve engaging the public and educating them with respect to the conditional term of imprisonment. There is some frustration among judges with respect to this issue; one respondent observed that "*in my jurisdiction, the Provincial Attorney General's Department has done nothing whatsoever to attempt to educate the public in this regard. The failure of our Provincial Governments to adequately explain to the public the process involved with a conditional sentence...does little to enhance public support.*"

Most judges consider the impact of a conditional sentence order on public opinion

Since judges were inclined to believe that most people do not understand the new disposition, it is not surprising, perhaps, that they considered the impact that a conditional sentence order might have on public opinion. As indicated in Table 2.28, almost half the sample stated that they always or most of the time considered the impact that a

conditional sentence would have. One-fifth of the sample stated that they never considered the impact of the sentence (see Table 2.28).

Table 2.28: Effect of Conditional Sentence on Public Opinion

Do you ever consider the impact that a conditional sentence order might have on public opinion? (Q27)	
Response	Percent of judges giving this response
Yes, all of the time	18.3%
Yes, most of the time	27.1%
Yes, some of the time	34.2%
No, never	20.4%
Total	100% (442)

Judges who had imposed a large number of conditional sentences (in excess of 10) were somewhat less likely to report taking public opinion into account. This rather paradoxical outcome may be explained by the fact that high users believed in the new conditional sentence, and were inclined to use the new sanction regardless of the impact on public opinion. Or, consideration of the response of the public inhibited some judges.

2.12 Utility of Risk Prediction Device

Finally, we end by noting the findings from a question, which probed reaction to risk prediction. The issue of risk of re-offending lies at the heart of the conditional sentencing regime. Indeed, section 742 is clear that a conditional sentence may not be imposed until and unless the court is satisfied that the presence of the offender in the community would not endanger the safety of the community. Predicting re-offending is a hazardous enterprise. One source of information relevant to risk comes from risk prediction scales. Judges responding to the survey were asked whether a statistical tool for predicting an offender's risk of re-offending would be useful. The general response was favourable to such a tool: almost half the sample (41%) responded that such a tool would be useful in all or most cases; only 15% said that it would never be useful (see Table 2.29).

Table 2.29: Utility of Risk Prediction Scale

Do you think a statistical tool for predicting an offender's risk of reoffending would be useful for judges in assessing risk? (Q6)	
Response	Percent of judges giving this response
Yes, in all cases	15.3%
Yes, in most cases	25.9%
Yes, in some cases	29.7%
Yes, in a few cases	14.4%
No, never	14.6%
Total	100% (437)

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